

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MICHAEL ALLEN COOPER,

Defendant-Appellant.

UNPUBLISHED
February 25, 2014

No. 313562
Oakland Circuit Court
LC No. 2012-239744-FC

Before: HOEKSTRA, P.J., and MURRAY and RIORDAN, JJ.

PER CURIAM.

Defendant appeals as of right his jury convictions of two counts of first-degree criminal sexual conduct, MCL 750.520b, and two counts of second-degree criminal sexual conduct, MCL 750.520c. Defendant was sentenced to 25 to 60 years' imprisonment for each first-degree criminal sexual conduct conviction, and to 4 to 15 years' imprisonment for each second-degree criminal sexual conduct conviction. For the reasons stated in this opinion, we affirm.

Defendant's convictions arise from allegations of years of sexual assault committed by defendant on his nephew when the victim was aged 9 to 14. The victim testified to approximately 100 acts of masturbation, oral penetration, attempted anal penetration, and sexual contact.

On appeal, defendant first argues that he was entitled to a specific unanimity jury instruction. We find that defendant waived review of this issue. Waiver is the "intentional relinquishment or abandonment of a known right." *People v Carter*, 462 Mich 206, 215; 612 NW2d 144 (2000) (citation omitted). Here, after instructing the jury, the trial court asked defense counsel, "[a]ny objection to the instructions as read?" and counsel responded, "[n]o objection." Thus, by approving the jury instructions, defendant waived review of this issue, extinguishing any error. *Id.* Nevertheless, we conclude that defendant was not entitled to a specific unanimity instruction.

"[W]hen the state offers evidence of multiple acts by a defendant, each of which would satisfy the actus reus element of a single charged offense, the trial court is required to instruct the jury that it must unanimously agree on the same specific act if the acts are materially distinct or if there is reason to believe the jurors may be confused or disagree about the factual basis of the defendant's guilt." *People v Cooks*, 446 Mich 503, 530; 521 NW2d 275 (1994). However, "[w]hen a defendant is tried on a charge of CSC [], and more than one aggravating circumstance

is supported by the facts, it is not error for the trial court to instruct the jury, in the alternative, regarding each of the applicable aggravating circumstances alleged by the prosecution.” *People v Gadomski*, 232 Mich App 24, 31-32; 592 NW2d 75 (1998). Here, although there were multiple penetrations/contacts alleged, each form of penetration/contact was presented as a separate count. Additionally, while the victim testified to multiple acts that could have served as the basis for each individual count, the acts presented for each count were not “materially distinct” and “were tantamount to a continuous course of conduct.” *Cooks*, 446 Mich at 511, 528. Each count also included alternative aggravating circumstances: either the victim was under 13 or the victim was aged 13, 14, or 15 and related to defendant. Because the victim testified that the sexual incidents occurred from age 9 to age 14, “more than one aggravating circumstance [was] supported by the facts.” *Gadomski*, 232 Mich App at 31-32. “Accordingly, defendant would have been properly convicted . . . even if some of the jurors believed that he committed the offense solely on the basis of one aggravating circumstance, while the rest of the jurors believed that he committed the offense solely on the basis of another one of the aggravating circumstances.” *Id.* Therefore, “the trial court’s instructions were legally correct.” *Id.* at 32.

Defendant also argues that trial counsel was ineffective for failing to object to the jury instructions. This argument is not properly presented for review because defendant failed to include it in his statement of the issues presented. *People v Unger*, 278 Mich App 210, 262; 749 NW2d 272 (2008). Moreover, our review is limited to mistakes apparent on the record because no evidentiary hearing was held in regard to defendant’s claims of ineffective assistance of counsel. *People v Davis*, 250 Mich App 357, 368; 649 NW2d 94 (2002). Nevertheless, because it is clear that defendant cannot demonstrate ineffective assistance of counsel because the trial court’s instructions were legally correct, trial counsel was not objectively unreasonable for failing to object to the jury instructions. *People v Ericksen*, 288 Mich App 192, 201; 793 NW2d 120 (2010).

Defendant next argues that a several incidents of prosecutorial misconduct denied him the right to a fair trial. These arguments are not properly preserved because defendant did not object. *Unger*, 278 Mich App at 234. Accordingly, our review is for plain error affecting defendant’s substantial rights. *People v Thomas*, 260 Mich App 450, 453; 678 NW2d 631 (2004).

Defendant first argues that the evidence elicited from the victim regarding defendant’s shooting of his dog was improper under MRE 404(b). However, defendant’s reliance on MRE 404(b) is misplaced because the prosecutor was not attempting to introduce evidence of a character trait to prove that defendant acted in conformity therewith. The prosecution asked the victim why he was scared of defendant because it was the prosecution’s argument that the victim did not report any of the sexual incidents sooner because he was scared. Thus, the fact that the victim heard defendant shoot and kill his dog was relevant because it made it “more probable” that the victim was too scared of defendant to report his acts. MRE 401. In addition, the evidence’s probative value was not substantially outweighed by the danger of unfair prejudice. MRE 403. Moreover, the trial court instructed the jury, “[y]ou must not convict the defendant here solely because you think he is guilty of other bad conduct,” and “[j]urors are presumed to follow their instructions.” *People v Abraham*, 256 Mich App 265, 279; 662 NW2d 836 (2003). Thus, we find no plain error requiring reversal. *Thomas*, 260 Mich App at 453.

Defendant next argues that the prosecution improperly argued to the jury in closing arguments that defendant shot the dog “in front of” the victim. “[A] prosecutor may not argue facts not in evidence or mischaracterize the evidence presented.” *People v Watson*, 245 Mich App 572, 586; 629 NW2d 411 (2001). While we agree that the prosecution “mischaracterize[d] the evidence presented” by asserting that defendant shot the dog “in front of” the victim when the testimony indicated only that he heard defendant shoot the dog, the trial court instructed the jury that the lawyer’s arguments were not evidence and that the case must be decided on the evidence. “Jurors are presumed to follow their instructions, and instructions are presumed to cure most errors.” *Abraham*, 256 Mich App at 279. Any “prejudicial effect of the prosecutor’s comments could have been cured by a timely instruction,” *Watson*, 245 Mich App at 586, and thus, we find no error requiring reversal.

Defendant next argues that the prosecution improperly stated that the victim never denied stealing scrap metal from defendant’s house. A prosecutor “is free to argue the evidence.” *People v Ackerman*, 257 Mich App 434, 450; 669 NW2d 818 (2003). Here, the victim testified that he stole the scrap metal. Thus, the prosecution’s argument was a proper argument based on the evidence. It is irrelevant that the victim denied taking the scrap metal at the preliminary examination because that information was never introduced as evidence at trial.

Defendant next argues that the prosecution twice vouched for the credibility of the victim. “[A] prosecutor may not vouch for the credibility of his witnesses by implying that he has some special knowledge of their truthfulness.” *Thomas*, 260 Mich App at 455.

First, defendant maintains that the prosecution vouched for the credibility of the victim when it was questioning the victim. The exchange defendant objects to took place after defense counsel questioned the victim about the prosecution’s preparation with the victim before the trial. The following exchange occurred between defense counsel and the victim:

Q. Well, let me ask it a different way. Did you talk to [the prosecutor] about what you were going to say today?

A. No, I didn’t talk to her about what I was going to say.

Q. So you’ve never discussed what you were going to say in court today with [the prosecutor]?

A. We—we discussed about the court date and how everything is going to go, but I’ve never discussed, like, word for word about my testimony.

In response to this questioning by defense counsel, the prosecution and the victim had the following exchange:

Q. . . . defense counsel asked you about whether you met with me, okay, did—have you ever come to my office and spoken to me?

A. Yes.

* * *

Q. Did I—during the course that you either spoke—that you spoke to me, did I ever, following from defense counsel’s questions, ever tell you what to say in court?

A. Never.

Q. What did I tell you to say, if anything?

A. You said just say—you said tell the truth.

Q. Okay.

A. That’s all you can do is tell the truth.

Q. So when he asked you did the prosecutor—did anybody tell you what to say, in fact, somebody did tell you what to say; is that correct?

A. Correct.

Q. Okay. And simply I just told you to tell the truth; is that right?

A. That’s correct.

Q. Okay. Did I ever ask you to tell me things that you thought would make the case better; anything of that nature?

A. No, ma’am.

Q. In fact, did I tell you just the opposite—or just to tell the truth; is that right?

A. You just told me just to tell the truth.

We find that nothing in the prosecution’s questioning indicated that it vouched “for the credibility of [the] witness[] by implying that [it] has some special knowledge of [his] truthfulness.” *Id.* Rather, the comments were “properly responsive” to defense counsel’s questions regarding possible coaching. *Id.*

Second, defendant argues that the prosecution improperly vouched for the victim’s credibility when it summarized the victim’s testimony. While summarizing the facts of the victim’s testimony, the prosecution stated that the evidence showed that the victim’s testimony was consistent. Nothing in the prosecution’s statement indicated that it vouched for the credibility of the victim by implying some special knowledge of his truthfulness. *Id.* The prosecution referenced the evidence and argued “from the facts that [the] witness should be believed,” *People v McGhee*, 268 Mich App 600, 630; 709 NW2d 595 (2005), which was proper when “the question of the defendant’s guilt depend[ed] on which witnesses the jury believes.” *Thomas*, 260 Mich App at 455.

Defendant next argues that trial counsel was ineffective for failing to object to the

prosecutor's statements.

Our review is limited to mistakes apparent on the record because defendant did not move for a new trial or *Ginther*¹ hearing. *Davis*, 250 Mich App at 368. In order to prevail on an ineffective assistance of counsel claim, the burden is on the defendant to demonstrate that defense counsel's performance fell below an objective standard of reasonableness, and that the deficiency so prejudiced defendant as to deprive him of a fair trial. *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994). Prejudice occurs if there is a reasonable probability that, but for defense counsel's error, the result of the proceedings would have been different. *People v Frazier*, 478 Mich 231, 243; 733 NW2d 713 (2007).

With the exception of the statement that the victim saw the dog shooting taking place "in front of" him, trial counsel was not objectively unreasonable for failing to object because those statements were proper. *Ericksen*, 288 Mich App at 201. Regarding the reference to defendant shooting the dog, trial counsel argued in his own closing argument that the prosecution misstated this fact; defendant has not shown that the decision to address the matter in closing rather than by objection was not "sound trial strategy." *People v Carbin*, 463 Mich 590, 599; 623 NW2d 884 (2001). Moreover, defendant has failed to demonstrate how this misstatement prejudiced his case. Indeed, we conclude that in light of the specific testimony of the victim about defendant's sexual abuse, the prosecution's misstatement of this ancillary matter was not prejudicial.

Defendant next argues that the trial court's upward departure from the sentencing guidelines was error.

A court may depart from the recommended minimum sentence range under the legislative guidelines for substantial and compelling reasons that are objective and verifiable and keenly or irresistibly grab the court's attention. *People v Smith*, 482 Mich 292, 299; 754 NW2d 284 (2008). "On appeal, courts review the reasons given for a departure for clear error." *Id.* at 300. "The conclusion that a reason is objective and verifiable is reviewed as a matter of law." *Id.* "Whether the reasons given are substantial and compelling enough to justify the departure is reviewed for an abuse of discretion, as is the amount of the departure." *Id.* "A trial court abuses its discretion if the minimum sentence imposed falls outside the range of principled outcomes." *Id.*

"Under MCL 769.34(3), a minimum sentence that departs from the sentencing guidelines recommendation requires a substantial and compelling reason articulated on the record. In interpreting this statutory requirement, the Court has concluded that the reasons relied on must be objective and verifiable," and must "keenly or irresistibly grab the court's attention." *Id.* at 299. While the trial court may not base a departure on an offense characteristic or offender characteristic already taken into account by the sentencing guidelines, it may base departures on characteristics that have "been given inadequate or disproportionate weight." *Id.* at 300.

In this case, the trial court specifically set forth its reasons for departing from the

¹ *People v Ginther*, 390 Mich 436, 443-444; 212 NW2d 922 (1973).

guidelines. Regarding offense variable (OV) 13, MCL 777.43, which is scored for a continuing pattern of criminal behavior, the trial court noted that OV 13 failed to take into consideration the years of abuse and the number of times the abuse occurred. Specifically, the trial court explained that OV 13 only takes into account patterns of felonious criminal activity involving three or more sexual penetrations; thus, it does not contemplate abuse that occurs consistently over several years. Regarding OV 4, MCL 777.34, which is scored for psychological injury to a victim, the trial noted that the victim in this case was sexually assaulted by “an uncle who he loved and trusted and cared about” and because of the “number of years of emotional damage,” OV 4 was “inadequate” and did not give an appropriate amount of weight “to the amount of psychological damage that [the victim] has endured.”

We conclude that the trial court’s departures were not erroneous. Regarding OV 4, the testimony established years of abuse and an extensive number of acts committed against the victim. The Court has recognized that sexual abuse occurring over a long period of time is an objective and verifiable reason for departure. *Smith*, 482 Mich at 301. The Court in *Smith* observed that the victim in that case “undoubtedly suffered psychological stress from the realization that defendant might abuse her again and again.” *Id.* It further held that “[t]his fact is of considerable worth in determining defendant’s minimum sentence.” *Id.* Finally, the Court recognized that the circumstances of prolonged abuse “does not exist in all criminal sexual conduct cases.” *Id.* Thus, we conclude the reason for departure was objective and verifiable, and the trial court did not abuse its discretion by concluding that this was a substantial and compelling reason for departure. *Id.*

Regarding OV 13, the testimony of the victim established approximately 100 acts of sexual assault over a period of years. Again, the Court has held the fact “[t]hat sexual abuse occurred over a long period is an objective and verifiable reason for departure.” *Id.* Thus, the trial court in this case did not abuse its discretion by concluding that the long period of abuse provided a substantial and compelling reason for departure. *Id.*²

“[T]o complete our analysis of whether the trial judge in this case articulated substantial and compelling reasons for the departure, we must, of necessity, engage in a proportionality review.” *Id.* at 304-305. Here, defendant had an OV score of 115, placing him in OV Level VI, and a prior record variable (PRV) score of 20, placing him in PRV Level C. For a Class A offense, MCL 777.62, defendant’s recommended minimum sentencing range under the legislative guidelines was 135 to 225 months’ imprisonment; however, the trial court sentenced defendant to a minimum of 25 years’ (300 months) imprisonment, resulting in an upward

² Defendant also argues that the trial court erroneously considered the fact that defendant shot his dog in deciding to depart from the guidelines. Based on a review of the record, we conclude that the trial court did not consider the shooting a substantial and compelling reason for departure. The trial court stated the previously discussed reasons for departure and made it clear that those were the substantial and compelling reasons for departure. The trial court then admonished defendant for his acts while including references to the dog. This admonishment was not included in the trial court’s description of its substantial and compelling reasons for departure.

departure of 6.25 years.

After the trial court's departure, defendant's sentence was two grids over and fell within the range for an offender with an OV Level of VI and a PRV Level of E. MCL 777.62. The difference between the two grids is 30 PRV points. Although defendant's sentence falls within a range two grids over, "the more egregious the offense . . . the greater the punishment." *Smith*, 482 Mich at 305. The victim testified to approximately 100 egregious acts committed by defendant that spanned the course of multiple years, which resulted in severe psychological and physical abuse. Thus, giving deference to the trial court's determinations and knowledge of the facts and the offender, the trial court did not err in departing two grids over on the sentencing grid. *People v Reincke*, 261 Mich App 264, 267-268; 680 NW2d 923 (2004). Moreover, a comparison of defendant's actual minimum sentence to the recommended minimum sentences for similar defendants with similar convictions supports a finding that defendant's sentence is proportionate. *Smith*, 482 Mich at 308. Currently under MCL 750.520b(2)(b), first-degree CSC is punished as follows: "[f]or a violation that is committed by an individual 17 years of age or older against an individual less than 13 years of age by imprisonment for life or any term of years, but not less than 25 years." Although the instant offenses occurred before the provision's effective date, a defendant who is now convicted of the same crime would be sentenced to a 25 year minimum just as defendant was in this case. Therefore, we conclude that the sentences chosen by the trial court were within the range of principled outcomes and were not an abuse of discretion.

Affirmed.

/s/ Joel P. Hoekstra
/s/ Christopher M. Murray
/s/ Michael J. Riordan